Bernie Lowe & Associates, Inc.
"Beyond the Product"

Health Care Reform Update

IMPORTANT NOTICE REGARDING HEALTHCARE REFORM
Update #7 **January, 2013**

IRS Issues Proposed Regulations on Employer Shared Responsibility Penalties

The IRS has issued proposed regulations and a Q&A on health care reform's shared responsibility ("play or pay") penalties for employers. Starting in 2014, the shared responsibility provision may impose penalties on employers with more than 50 full-time equivalent employees if they;

1. Do not offer minimum essential coverage under an eligible employer-sponsored plan (terms that are to be defined in future regulations) to their full-time employees, or
2. Offer minimum essential coverage but it is either not affordable or does not provide a minimum level of coverage.

The IRS is requesting comments on the proposed regulations be submitted by March 8. Employers should rely on these proposed regulations until final regulations or other guidance is issued. If the final regulations or later guidance becomes more restrictive, it will not apply retroactively. Employers will be given time to comply with final regulations once issued.

Key highlights of the new guidance:

Determining Applicable Large Employer Status

A large employer is defined as one that employs an average of at least 50 full-time employees including full-time equivalent employees (FTEs). The definition excludes employees who work outside the United States. Tax-exempt organizations, federal, state, and local governments may be applicable large employers. All employers within the same controlled group (generally using the same rules as for qualified retirement plans) are treated as a single employer.

- This determination is made retrospectively, e.g., employees are counted in 2013 to determine applicable large employer status in 2014, with a special rule for new employers not in existence during the entire preceding year. A transition rule allows employers to choose any period of six consecutive months in 2013 to determine their status for 2014.

- For each month during the calendar year, the employer must add up the full-time employees (those who averaged 30 or more hours per week during the month; the employer can also elect to use 130 hours per month as an equivalency) and FTEs (determined by totaling the hours for all non-full-time employees for the month and dividing by 120) and then divide the yearly total by 12. If an employer exceeds the 50-employee threshold for 120 days or less during the year, whether or not consecutive, and the excess is attributable to seasonal workers, the employer will not be considered an applicable large employer.

Determining Full-Time Employees

If an employer is determined to be a large employer, it must identify full-time employees. For this purpose, a full-time employee is considered fulltime for any calendar month they are employed an average of at least 30 hours per week (or 130 total hours during the month); FTEs are disregarded. Hours worked outside the United States are generally not included. All hours of service performed for employers within the same controlled group must be counted.

- For hourly-paid employees, an employer must count all paid work and non-work hours (e.g., vacation, illness, jury duty). The employer can use actual hours worked or an equivalency (eight hours for each full or partial workday, or 40 hours for each full or partial workweek), unless the equivalency would understate the employee's hours.

- The proposed regulations adopt the measurement, administrative, and stability periods described in prior IRS notices with minor modifications, and add rules for changes in employment status, rehired employees, and leaves of absence. A transition rule (applicable only to a stability period beginning in 2014) allows employers to pair a measurement period of less than 12 months (but not less than 6 months) with a 12-month stability period, permitting them to delay the start of their first measurement period until as late as July 1, 2013.

    - Measurement period –The time period employers may use to determine which employees will be treated as fulltime for purposes of healthcare reform's shared responsibility penalties.
    - Administrative Period – Up to a 90 day period in which the employer may conduct enrollment for employees found to be fulltime during the measurement period. Employees enrolled will be covered through the stability period.
    - Stability Period – The time period in which the employee will have coverage. This period must be at least six months, and at least as long as the measurement period and must be the same for both new and ongoing employees.

- Recognizing that educational organizations are different from other workplaces because the academic year includes extended breaks when school is not in session and few or no services are performed, the proposed regulations provide an averaging method so that employees who work full-time during the active portions of the academic year will not lose full-time status solely because they do not work when the organization is not in session.

Calculation of Penalties

The proposed regulations contain important clarifications regarding calculation of penalties, including the following:

- The "no-offer penalty" is determined when an employer does not offer coverage to its fulltime employees. The penalty is calculated by multiplying the total number of the employer's full-time employees (less 30) times $2,000. This penalty is applicable only if one or more full-time employees receive a premium tax credit for a given calendar month.

- The "under-offer penalty" is determined when an employer offers a plan but it does not meet of minimum essential coverage. This penalty is calculated by multiplying $3,000 times the number of the employer's full-time employees who receive a premium tax credit for a given calendar month). Note this penalty cannot exceed the maximum of $2,000 times the number of the employer's full-time employees, as calculated in the no-offer penalty.

- Even if separate employers are treated as a single employer to determine whether they are an applicable large employer, each employer's offer of coverage is analyzed separately for purposes of assessing penalties (so, for example, one employer in a controlled group may be subject to penalties while another may not be).

- An employer can avoid the no-offer penalty if it provides minimum essential coverage under an eligible employer-sponsored plan to substantially all its full-time employees (and their dependents). The regulations define "substantially all" to mean at least 95% of full-time employees. The regulations interpret the statutory reference to "and their dependents" to include children who have not attained age 26. However a transition rule applicable only to plan years beginning in 2014 excuses the dependent coverage requirement if the employer "takes steps" toward offering coverage to dependent children.

- An employee actually enrolled in minimum essential coverage under an employer-sponsored plan is not eligible for a premium tax credit, and therefore cannot trigger a shared responsibility penalty. The proposed regulations appear to preclude mandatory enrollment of employees in an employer-sponsored plan as a strategy to avoid penalties, emphasizing that an "offer" of coverage must include an opportunity for the employee to decline coverage.

- The proposed regulations provide three affordability safe harbors (which consider whether the employee contribution amount is less than 9.5% of any of the following: the employee's Form W-2 wages, the employee's rate of pay, or the federal poverty line for individuals) and reiterate that a minimum value calculator will be forthcoming.

Effective Dates and Transition Rules

In general, the penalties apply for months after December 31, 2013, but the regulations contain the following special rules:

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- The preamble provides a complicated transition rule that permits non-calendar-year plans to avoid penalties for months preceding the first day of the 2014 plan year (the plan year beginning in 2014), but only if affordable, minimum value coverage is offered to full-time employees starting no later than the first day of the 2014 plan year. (In some cases, additional eligibility or coverage conditions apply.) This special rule does not excuse non-calendar-year plans from Code § 6056 reporting for the entire 2014 calendar year.

- Another transition rule would allow non-calendar-year cafeteria plans to permit employees to change health plan elections during the cafeteria plan year beginning in 2013, e.g., to allow them to enroll in their employer-sponsored coverage to avoid the individual shared responsibility penalty. (A cafeteria plan allowing these elections must be amended by December 31, 2014, effective retroactively to the first day of the plan year starting in 2013.)

- A special transition rule for 2014 is intended to facilitate compliance for employers contributing to multiemployer plans.

For full details on the information contained in this update:

IRS Proposed Regulations
http://www.gpo.gov/fdsys/pkg/FR-2013-01-02/pdf/2012-31269.pdf

IRS Q&A
http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act